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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

ENOCH ADAMS, JR., LEROY ADAMS, )  
ANDREW KOENIG, JERRY NORTON, )  
DAVID SWAN, JOSEPH SWAN, )  
Plaintiffs, )  
vs. ) Case No.: A04-00049 CV (JWS)  
TECK COMINCO ALASKA )  
INCORPORATED, )  
Defendant, )  
NANA REGIONAL CORPORATION, and )  
NORTHWEST ARCTIC BOROUGH, )  
Intervenor-Defendants. )

TECK COMINCO ALASKA INC.'S MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL FACTUAL MATERIALS

Defendant Teck Cominco Alaska, Inc. ("Teck Cominco"), through its counsel Hartig Rhodes Hoge & Lekisch, P.C., moves this Court for leave to file supplemental factual materials in support of its Opposition to Motion for Partial Summary Judgment ("Opposition") filed October 3, 2005 and pursuant to D. Ak. LR 7.1(h)(2). The supplemental materials Teck Cominco seeks leave to file are:

- a) the 2006 draft NPDES permit for Red Dog Mine, the accompanying Fact Sheet, the Environmental Assessment and Finding of No Significant Impact. (Collectively "Draft NPDES Permit"). These are public documents prepared by and kept by the U.S. Environmental Protection Agency and the Alaska Department of Environmental Conservation as part of the permitting record for the Red Dog Mine.
- b) The "Toxicity Reduction Work Plan" prepared by Teck Cominco and submitted to EPA under the 1998 and 2003 modified NPDES permits for the Red Dog Mine. This is a work plan required to be filed with EPA by Teck Cominco pursuant to the terms of the 1998 and 2003 Modified NPDES permits for the Red Dog Mine.
- c) The April 21, 2006 letter from Michael F. Gearheard, Director of Water and Watersheds of EPA Region 10 to Lynn J. Tomich Kent, Director, Division of Water, Alaska Department of Environmental Conservation referencing EPA's approval of a change in Alaska's Total Dissolved Solids (TDS) water quality standard for Main Stem Red Dog Creek during the grayling spawning period.

The documents attached are relevant to questions posed in the Court's April 28, 2006 Order (Docket 128) and will be referred to by Teck Cominco's counsel during oral argument on June 15, 2006. Supporting this motion is the Affidavit of Mark Thompson filed with this motion. Each of the supplemental material described above is attached to Mr. Thompson's Affidavit and authenticated by him. The Draft NPDES Permit

documents and April 21, 2006 EPA letter are also self-authenticating under F.R.E. 901(b)(7).

### DISCUSSION

Local Rule 7.1(h)(2) allows a party to file “[s]upplemental factual materials...on account of a change in circumstances...by leave of court.” In determining whether leave should be granted, “[t]he court will consider, among other things – (i) whether the material was available to the parties when briefs were due, and (ii) whether the pertinence of the material was established at the times for briefing.” D. Ak. LR 7.1(h)(2).

*i. The Draft NPDES Permit was not available to Teck Cominco on October 3, 2005.*

Teck Cominco’s Opposition was due October 3, 2005. The Draft NPDES Permit was not available at that time, however, Teck Cominco indicated it expected a draft NPDES permit to be issued in December 2005 and a final NPDES permit to be issued before the beginning of discharge season in 2006. [Aff. Luke Boles at ¶ 7 (September 28, 2005) attached as Exhibit 11 to Def.’s Opp., docket 128] The Draft NPDES Permit was issued in February, 2006.

*(i) Teck Cominco established the pertinence of the Draft NPDES Permit in its October 3, 2005 Opposition.*

Teck Cominco anticipated that numerous changes, particularly with respect to TDS and cyanide, would be relevant to this Court’s determination of plaintiffs’ Motion for Partial Summary Judgment. Throughout its Opposition, Teck Cominco indicated the expected changes to its new NPDES Permit. See e.g., Opp. at pp 18-19, 22, 33-34, 40-41, 45-46. In terms of the oral argument scheduled for June 15, 2006, the Draft NPDES Permit is relevant to the Court’s questions Nos. 4 and 5.

- (iii) *The "Toxicity Reductions Work Plan" addresses questions first raised in the Court's April 28, 2006 order.*

The Toxicity Reduction Work Plan was developed and available to Teck Cominco prior to October 3, 2005, but the significance of it to the resolution of issues in this case was not apparent until the Court's April 28, 2006 Order. The Order raises questions regarding the appropriateness of taking split samples and reporting the results of split samples in Discharge Monitoring Report particularly, where the analysis of one split sample conflicts with the analysis of another split sample. [April 28, 2006 Order, question 4 and 6.]

- iv. *The TDS SSC Approval Letter was not available to Teck Cominco on October 3, 2005.*

Again, Teck Cominco's Opposition was due on October 3, 2005. The TDS SSC Approval Letter was not issued by EPA until April 21, 2006. Although Teck Cominco referred in the Opposition to on-going work to establish a new TDS criterion for Main Stem Red Dog Creek, Teck Cominco did not have the TDS SSC Approval Letter to refer to at that time.

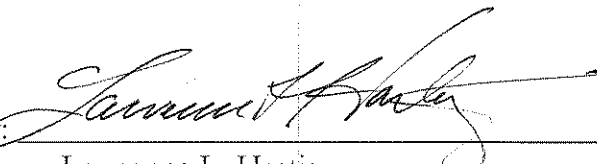
### CONCLUSION

Teck Cominco respectfully requests this Court grant Teck Cominco leave to file the 2006 draft NPDES permit, Toxicity Reduction Evaluation Work Plan and April 21, 2006 letter from EPA.

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DATED at Anchorage, Alaska, this 15<sup>th</sup> day of June, 2006

HARTIG RHODES HOGE & LEKISCH, P.C.  
Attorneys for Teck Cominco Alaska, Inc.

By:   
Lawrence L. Hartig  
Sean Halloran

CERTIFICATE OF SERVICE

I hereby certify that on the 14<sup>th</sup> day of June, 2006,  
a true and correct copy of the foregoing was served,  
via First Class Mail, on the below identified parties of  
record:

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